IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 180

WILLIAM L. GREENE, *Petitioner,*

v.

NEIL M. MCELROY, THOMAS S. GATES, JR., and ROBERT B. ANDERSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL W. BERUEFFY
1625 Eye Street, N. W.
Washington, D. C.
Attorney for Petitioner

July 16, 1958

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES, EXECUTIVE ORDERS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

WILLIAM L. GREENE, *Petitioner,*

v.

NEIL M. MCELROY, THOMAS S. GATES, JR., and ROBERT B. ANDERSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William L. Greene prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 17, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the trial court, printed in Appendix A hereto, *infra,* pp. 1a to 4a, is reported *sub nom. Greene* v. *Wilson,* in 150 F. Supp. 958 (D.D.C., 1957). The opinion of the Court of Ap-

peals, printed in Appendix B hereto, *infra*, pp. 5a to 23a, is reported in 254 F. 2d 944 (adv.). It is not yet reported in the U.S. App. D.C. reports.

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether a justiciable controversy is presented by a suit for declaratory and injunctive relief challenging as invalid an order of the Secretary of the Navy denying access to clearance to classified information, which suit is instituted by a former employee of a private business enterprise discharged because of such order, and which asserts that the order is invalid because it is without foundation in fact; is beyond the statutory authority of the Secretary; and is in violation of the requirements of substantive and procedural due process?

2. Whether the provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C., § 153, authorizing defense procurement contracts "of any type which in the opinion of the agency head will promote the best interests of the Government," grant Department of Defense officials unlimited discretion to cause the discharge of employees of private business enterprises by denying access to classified information? and, if so, do this attempted grant and the regulations promulgated thereunder violate the requirements of substantive due process?

3. Whether, if valid reasons are required for the denial of clearance, a statement of reasons which re-

cites only conduct which is neither illegal nor immoral, and all of which occurred at least seven years prior to the issuance of such statement, is sufficient as a basis for such denial?

4. Whether the requirements of procedural due process are violated by the Industrial Security regulations, which permit denial of access to information necessary for private employment on the basis of an inference by a governmental official of possible future conduct, which inference is purportedly based on information the nature and source of which is not revealed to the affected employee; and which is supplied by persons who are not required to furnish such information under oath, nor to be cross-examined; and which information the affected employee consequently has no real and effective opportunity to refute or explain, although the regulations place the entire burden of proving innocence upon the employee?

STATUTES INVOLVED

5 U.S.C., § 22, R.S. § 161:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Armed Services Procurement Act of 1945, 62 Stat. 21, 41 U.S.C., (1952 edition), §§ 151-161:

> 151(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such

purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress; * * *

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed; * * *

153 * * * Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. * * *

Executive Order 10290, September 27, 1951, 16 Fed. Reg. 9795:

30 (b) Classified security information shall not be disseminated outside the Executive Branch by any person or agency having access thereto or knowledge thereof except under conditions and through channels authorized by the head of the disseminating agency, even though such person or agency may have been solely or partly responsible for its production.

Executive Order 10501, December 15, 1953, 18 Fed. Reg. 7049:

Safeguarding Official Information in the Interests of the Defense of the United States

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United

States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * *

7(b) *Dissemination Outside the Executive Branch.*. Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the dissseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

STATEMENT

In this suit, the petitioner sought a judicial declaration that an order of the Secretary of the Navy excluding petitioner from the plant of his employer, Engineering and Research Corporation, was invalid as in excess of the constitutional and statutory powers of the Secretary. He also sought to restrain the respondents from taking any action in pursuance of the order. (R., p. 8). The jurisdiction of the District Court was invoked under its general jurisdiction, and under the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C., § 1009. (R., p. 1)

Prior to the issuance of the order complained of, William L. Greene was vice-president in charge of

engineering and general manager of Engineering and Research Corporation, a private business enterprise engaged in building electronic flight simulators under contracts with the Navy. He had been employed by ERCO for seventeen years.[1]

The order which the suit challenged was contained in the following letter, dated April 17, 1953, from the Secretary to petitioner's employer:

> I have reviewed the case history file on William Lewis Greene and have concluded that his con-

---

[1] During these seventeen years, on the basis of a distinguished record of achievement, Greene had risen from junior engineer to general manager of the company.

After his graduation from the Guggenheim School of Aeronautics, of New York University (R., p. 571), Greene began a career with ERCO which, except for a brief leave of absence, continued until Anderson caused his discharge. (R., p. 570). During the latter part of World War II, he became chief engineer of the company's propeller division; in 1948, chief engineer; (R., pp. 570, 571) and in 1951, vice-president in charge of engineering. Shortly thereafter, he was made general manager. (R., p. 571). This steady advance attests the competence and reliability described by Colonel Henry A. Berliner, chairman of the board of ERCO, who said, (R., p. 341) ". . . He was the best of the younger men we had there."

This evaluation was confirmed by the testimony of General Gabriel P. Disosway, then Director of Training for the Air Force; (R., p. 105) Admiral T. A. Solberg, retired chief of the Office of Naval Research; (R., pp. 102, 103) and Colonel John C. Robertson, chief of the Training Aids Division of the Air Force. (R., p. 90).

The importance of two contributions to defense, the development of the Navy rocket launcher used in World War II, and the development of the electronic flight simulator, described in detail by Colonel Berliner, (R., pp. 342-344), demonstrates the validity of the conclusion of the Court of Appeals, (*infra*, p. 21a) which observed, "As we have recognized, the reality of the injury suffered by Greene—whether or not deserved—is perfectly clear. So, too, is the risk which the United States must take in denying itself the benefit of the services of a man apparently so proficient in the science of modern warfare."

timued access to Navy classified information is inconsistent with the best interests of National security.

In accordance with paragraph 4. e. of the Industrial Security Manual for Safeguarding Classified Security Information, therefore, you are requested to exclude William Lewis Greene from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified security information.

In addition, I am referring this case to the Secretary of Defense recommending that the Industrial Employment Review Board's decision of 29 January 1952 be overruled.

No notice to Greene preceded the sending of this letter; no opportunity was afforded him to reply to the unstated reasons for the action. In fact, Anderson refused even to discuss the action with the employer. (R., p. 202).

This letter compelled the company to discharge Greene, though not without protest by his employer, (R., p. 201), and not finally until it had no alternative. (R., p. 579). The necessity for Greene's discharge arose from his inability to perform his duties as general manager without access to the work in the plant; the company's inability to segregate Navy work because of the physical arrangement of its plant; and the Navy's position as the company's principal customer and source of financing. (R., p. 571). In addition, the regulations required that Greene as an officer of the company have security clearance.[2] Colonel Berliner's affidavit (R., p. 570) states, "There was no other reason for Mr. Greene's discharge, and in the

[2] 32 C.F.R. § 72.8 (1955), § 72.2-107 (Supp., 1956).

absence of the letter referred to, he could have continued in the employment of Engineering and Research Corporation indefinitely."

The Anderson order reversed four previous determinations favorable to Greene. On August 9, 1949, Greene had been given a "confidential" clearance by the Army; (R., p. 65); on November 9, 1949, a "top secret" clearance by the Assistant Chief of Staff G-2, Military District of Washington; on February 3, 1950, a "top secret" clearance by the Air Materiel Command. R., p. 65, Stipulation of Facts, ¶ 3).

In November, 1951, two years after his first clearance by the Army for "top secret," Greene's clearance was challenged by the Army-Navy-Air Force Personnel Security Board, which, in accordance with the regulations as they then existed, furnished him with a "statement of charges" to which Greene replied in writing and in person.[3]

At the conclusion of these proceedings, Greene's clearance was restored and remained in force until the letter was sent by Anderson. The theory under which Anderson asserted the right to over-rule the

[3] The charges contained in the statement upon which these proceedings were based were: "That over a period of years, 1943-1947, at or near Washington, D.C., you have closely and sympathetically associated with persons who are reported to be or to have been members of the Communist Party; that during the period 1944-47 you entertained and were visited at your home by military representatives of the Russian Embassy, Washington, D.C.; that, further, you attended social functions during the period 1944-1947 at the Russian Embassy, Washington, D.C.; and on 7 April 1947 attended the Southern Conference for Human Welfare, Third Annual Dinner, Statler Hotel, Washington, D.C. (Cited as Communist Front organization, Congressional Committee on Un-American Activities.)" (R., pp. 78, 79).

decision of the previous board, without any notice or opportunity for Greene to reply, was summarized by the respondents in their brief in the Court of Appeals (Appellees' Brief, p. 27), in the following language:

> The Secretary's letter of April 17, 1953, was written during an interim period after the abolishment of the Army-Navy-Air Force Personnel Security Boards and the establishment of the new Regional Industrial Personnel and Facility Clearance Program, during which time the sole authority and responsibility for protecting the integrity of classified Navy Department information was vested in the Secretary of the Navy. During this period, the Secretary of Defense, in his memorandum of March 27, 1953 (J.A. 198) authorized the three Secretaries of the Army, Navy, and Air Force to make all necessary security determinations. From March 27, 1953 until May 4, 1953 no formal industrial personnel clearance program was in effect and there existed no administrative machinery for notice, service of charges, hearing or review.

Subsequently, regulations[4] were adopted by the secretaries of the three defense services. In response to Greene's continued demands, a statement of reasons was furnished to him by the Eastern Industrial Personnel Security Board,[5] and Greene was permitted

---

[4] The text of these regulations was included as an exhibit to the complaint, and is set forth in the Record, at p. 9 et seq.

[5] The statement of reasons is set forth in full in the Record, pp. 32-34. It may be summarized by saying that it alleges no occurrence after 1947, and, with the single exception of a claim that Greene owned stock and was a director of Radio Station WQQW (now Radio Station WGMS), it had no reference to any matter which was not fully explored in the proceedings before the Army-Navy-Air Force Board.

to testify and to produce witnesses whose evidence completely refuted the significance of the matters set forth in the statement of reasons.[6]

More than a year after the Anderson letter, the Eastern Industrial Personnel Security Board "affirmed" Anderson's decision, and this suit was thereafter instituted.

The complaint (R., pp. 1-8) challenged the action of Anderson and that of the Eastern Industrial Personnel Security Board as unwarranted by any facts, as lacking statutory authority, and as violating the constitution. Following the filing of an answer, a stipulation of facts was entered into and cross-motions for summary judgment were filed.

The trial Court overruled the petitioner's motion for summary judgment and sustained that of the respondents, holding that the acts of the respondents were authorized as security measures, and had, therefore, invaded no legal right of the petitioner. An appeal to the Court of Appeals followed, and the judgment of the trial Court was affirmed.

---

[6] The respondents in effect concede that the open record justifies this conclusion. In their brief in the Court of Appeals, they said (p. 29), "And since the entire record considered by appellees included confidential information which neither appellant nor this Court is in a position to weigh, it is clear that appellant's charge that the findings themselves are not supported by the open record is immaterial."

REASONS FOR GRANTING THE WRIT

I. The Existence of Unlimited Power By Any Governmental Official to Deprive a Citizen of Present Private Employment, Prevent Him From Obtaining Other Employment, and Impose Upon Him a Designation of Disloyalty Presents a Novel Question Important to the Constitutional Rights of Citizens Which Has Not Been, But Should Be, Determined by This Court.

The order of the Secretary of the Navy of which this suit complains had three direct effects upon the petitioner and his livelihood: it caused him to lose the employment which he had had for seventeen years; it effectively prevented him from obtaining other employment in his chosen profession as an aeronautical engineer; and it exposed him to a status of public ridicule and scorn.[7] The respondents have consistently asserted an unlimited authority to do these things to petitioner or to any one else whose employer is engaged in defense procurement contracts.

The decision of the Court below upheld the existence of such an unlimited authority on the part of the respondents by holding that none of these invaded any legally protected right of the petitioner. The gist of its decision is in the following language which it quoted with approval from the war-time case of *Von Knorr v. Miles*, 60 F. Supp. 962, 971 (D. Mass., 1943):

> No matter what evidence might be offered by counsel for the government or counsel for the individual, the government would remain legally free to disregard the testimony and rely upon its uncorroborated suspicions. Since in this highly exceptional case, because of its vital interest in war materials and war secrets during war time the

[7] The Court below conceded that these three distinct injuries to the petitioner had been demonstrated by the record. (*Infra*, pp. 20a, 21a).

government's exclusionary powers are complete, it can refuse admittance to defense plants without giving an explanation, without listening to a protest and without the semblance of a trial.

Has such an unlimited and unrestricted authority been granted to the respondents by Congress? Assuming, arguendo, that Congress has attempted to grant such power, would the existence of such total governmental control over the lives and livelihood of citizens be tolerable under the due process clause of the Fifth Amendment?[8] The petitioner asserts that each of these questions must be answered in the negative, "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370.

That the right of the individual to contract for his labor, free from arbitrary governmental interference, is included in the liberty and property protected by the due process clause is a principle to which this Court has adhered in an unbroken line of decisions, beginning with *Butchers' Union Slaughterhouse and Livestock Co.* v. *Crescent City Livestock Landing and Slaughterhouse Co.,* 111 U.S. 746, in which it was expressed in the concurring opinion of Mr. Justice Fields in the

[8] The war power is, under proper circumstances, an extremely broad one, and the respondents claim that the power to deny clearances is derived from the war power. But this Court has noted its re-affirmation of the principle that all powers of Congress, including the war power, are limited by the due process requirements of the Fifth Amendment. *Galvan* v. *Press,* 347 U.S. 522, 530; *Hamilton* v. *Kentucky Distilleries,* 251 U.S. 146, 155.

following language, "The right to pursue [a chosen occupation] without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birth-right." 111 U.S., at p. 757. *Cummings* v. *Missouri*, 4 Wall. 2, 277; *Ex parte Garland*, 4 Wall., 333; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Coppage* v. *Kansas*, 236 U.S. 1; *Truax* v. *Raich*, 239 U.S. 33; *Adkins* v. *Children's Hospital*, 261 U.S. 525; *Meyer* v. *Nebraska*, 262 U.S. 390. The principle that the right of employment will be protected against arbitrary interference by the government is fundamental and vital. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41.

The Court of Appeals recognized that petitioner's discharge resulted from Anderson's order. (Infra, pp. 20a, 21a). Notwithstanding the clearly demonstrated injury to the plaintiff's constitutionally protected right, the Court below denied the existence of a justiciable controversy. Cf. *United States* v. *Lovett*, 328 U.S. 303, 314. The error of the Court below is the consequence of its failure to recognize that the verbalisms under which the result is accomplished can not in fact and in logic alter the reality of the interference with the freedom of the petitioner to make contracts with other citizens with reference to his labor. Whether the interference is or is not in excess of the statutory powers of the Secretary; whether the reasons asserted in support of the order and the regulations are or are

not valid; whether the procedures followed do or do not satisfy constitutional requirements are issues which must of necessity be decided by the Courts.

The Court of Appeals necessarily premised its decision on the assumption that access to classified material can arbitrarily be denied, even though this results in the loss of petitioner's employment and deprives him of other opportunities for employment. This reasoning ignores the fact that such access is granted as a matter of course to others. ". . . the Department of Defense will assume, unless information to the contrary is received, that all contractors and contractor employees are loyal to the Government of the United States." *Regulations,* R., p. 54. An administrative official may not arbitrarily deny one citizen what is generally granted to other citizens. This Court has only recently re-affirmed its adherence to the requirement that all be treated fairly in matters of engaging in lawful occupations. In *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239, this Court held that the fact that the practice of law is an occupation in which regulations to insure moral and professional qualification are necessary does not create unlimited power to deny admission to practice. It said, "We need not enter into a discussion whether the practice of law is a 'right' or a 'privilege'. Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons." See also, *Wieman* v. *Updegraff,* 344 U.S. 183, 191, 192; *Slochower* v. *Board of Education,* 350 U.S. 551, 559.

Two problems are presented by the petitioner's claim for relief: the existence of statutory authority

for the Secretary's action; and the extent to which such statutory authority, if it exists, is limited by the due process clause.

The Court of Appeals attempted to find statutory authority for the Secretary's order in the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. (1952 ed.), § 153. (*Infra*, p. 12a) This statute authorizes the head of an agency to adopt a contract of "any type which in the opinion of the agency head will promote the best interests of the Government. * * *" The interpretation of this statute by the Court of Appeals as a grant of unlimited authority to the defense departments to control employment of workers in private business enterprises is inconsistent with the principles re-iterated by this Court in *Kent* v. *Dulles*, (decided June 16, 1957) 26 U.S. Law Week, 4413, 4416, where the Court said:

> And, as we have seen, the right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that liberty is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra* [343 U.S. 579]. And if the power is to be delegated, the standards must be adequate to pass scrutiny by the accepted tests. See, *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420-430. Cf. *Cantwell* v. *Connecticut*, 310 U.S. 296, 307; *Niemotko* v. *Maryland*, 340 U.S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo*, 323 U.S. 283, 301-302; Cf. *Hannegan* v. *Esquire*, 327 U.S. 146, 156; *United States* v. *Rumely*, 345 U.S. 41, 46. We hesitate to find in this broad

generalized power authority to trench so heavily on the rights of the citizen.

The right to travel abroad is an important one. But can it be said to be more necessary to the well-being of a citizen than the right of one trained as an aeronautical engineer and fitted by long and distinguished experience to retain or find employment with private business enterprises engaged in that field? or to be protected against the imposition of "badges of infamy" by a government official, high or petty? And where access to government information is generally granted to citizens, and is essential to employment in private industry, can it be said that a citizen does not have a constitutionally protected right to be treated fairly and not denied such access without a valid reason?

The importance of these questions can scarcely be denied. Obviously, the denial of the clearance and the authority or lack of authority of the Secretary to take that action is a matter of over-whelming importance to the petitioner. He has lost the employment which he gained by seventeen years of loyal and distinguished service. (Supra, p. 6). He has found it impossible to obtain other employment in the field of æronoutical engineering.[9] (R., p. 572). Officials of the government have inflicted upon him a "badge of infamy." *Wieman* v. *Updegraff*, 344 U.S. 183, 191.

---

[9] Greene's experience in seeking other employment has been general with all who have suffered disqualification on the basis of security. The denial of clearance to all practical purposes forecloses the possibility of employment in the aircraft industry. "Industry Goal: Simple Employee Loyalty Check," *Nation's Business*, December, 1955, p. 40; See also, Berle, *The 20th Century Capitalist Revolution*, (1954), pp. 92, 93.

Nor is the government without a substantial stake in the injuries inflicted under the guise of security. As the Court below noted, (*infra*, p. 22a), the risk to the government itself inherent in refusing the services of the petitioner's skill in the science of war.

Another vital interest gravely affected by the action of the Secretary was that of Engineering and Research Corporation, which was deprived of the valued services of a key employee. The question of whether the Secretary can thus deprive a business of the services of its employees is vital, especially to small businesses.[10] Though we assume that a department secretary will act in good faith, the potential of damage to business enterprises through such interferences with their employees is tremendous.

More significant in evoking the exercise of this Court's jurisdiction than these individual considerations is the fact that if the Secretary possesses the unlimited authority he claimed and exercised against Greene, every employee of every business enterprise which contracts with the defense departments is subject to governmental control. Accurate estimates of the number of people whose lives are subject to this governmental control are difficult, if not impossible. The Commission of Government Security estimated that the Industrial Security Regulations apply to 22,000 private business establishments and their three million

---

[10] The effect of depriving a small business of its key personnel may, in many instances, be of great seriousness to its operations. The record leaves no doubt that Greene was *the* key man of ERCO. The extent to which the loss of Greene's services contributed to that result is problematical, but the fact is that ERCO has ceased to exist as an independent business enterprise. *The Washington Post*, November 11, 1954, p. 21.

employees.[11] This case itself demonstrates that not only are the thoughts, friends, activities, and associations of the employee examined under the Industrial Security regulations, that scrutiny extends as well to those of his relatives or former relatives by marriage. It would not be unreasonable to suppose that the lives of some ten million people are included within the sweep of governmental supervision under the Industrial Security program alone. Since in addition to its coverage of industrial plants, the regulations are also applied to the faculties of colleges and universities engaged in research[12] for the Department of Defense, the effect of the program upon academic freedom and inevitably upon the educational system is a matter of sober concern for the future, as well as the present, well-being our society.

Beyond these considerations is the need for protection of a priceless constitutional right, integral to the American way of life. Most citizens cannot in fact enjoy the benefits of the rights and privileges afforded them by the Constitution until they have first exercised the right to earn a livelihood at one of the common occupations of mankind in order to secure the means of travel, reading, thought, and association which are included within the scope of constitutionally protected rights. Can this most fundamental right be destroyed on the basis of rumor and hearsay, the source and content of which is not even known to the em-

[11] *Report of the Commission on Government Security* (1957), p. 235.

[12] *Ibid.*, p. 237.

ployee?[13] and which he therefore cannot refute? As the Court in *Parker* v. *Lester* (CA 9, 1955), 227 F. 2d 708, 721, said in holding that proceedings substantially similar to the Industrial Security proceedings offended the due process clause:[14]

> But the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists. Such a system was not that ordained by the framers of our Constitution. It is the latter we are sworn to uphold.

The absolute and unlimited control of private employment approved by the Court below is wholly irreconcilable with the protection of the right of employment by the provisions of the due process clause. The freedom of employment from arbitrary interference which has been consistently sustained by this Court can not exist alongside the Industrial Security regulations. Any decision that the latter are to prevail is a matter of transcendental importance which should be made by this Court alone.

---

[13] The government stipulated in this case that matters of which Greene had no knowledge served, in part at least, as the basis of the adverse decision against him. The stipulation states, "In making its decision, the Eastern Industrial Personnel Security Board took into consideration the whole file of the case which includes information, neither the content, nor source of which has been revealed to plaintiff." R., pp. 67, 68, *Stipulation of Facts*, ¶ 23.

[14] As is pointed out, *infra*, pp. 20-22, *Parker* v. *Lester* is in direct conflict with the holding of the Court below on the issue of the existence of a justiciable controversy. Since the Court below held that no such justiciable controversy existed, it did not reach the issue of the constitutional validity of the procedures utilized in the Industrial Security program and in the Port Security program. Consequently, its observations that the Industrial Security program afforded procedural due process are dicta. However, these dicta (*infra*, pp. 15a-20a) are in diametrical disagreement with the ruling of the Court in *Parker* v. *Lester*.

II. The Decision of the Court Below is in Conflict, With Respect to an Important Constitutional Issue, With Parker v. Lester, 227 F. 2d 708 (CA 9, 1955).

The decision of the Court below denied petitioner relief against the invalid order of the Secretary of the Navy, basing that denial on its conclusion that the case did not present a justiciable controversy. The essence of the decision is contained in the following language (*infra*, p. 21a):

> The reality of the injury, however, does not mean that Greene is entitled without more, to judicial relief. There must be a justiciable controversy—one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence. Here there is no such controversy.

This conclusion, of course, means that the claim that the Secretary has acted in excess of his authority cannot be challenged, despite the admitted injury to the petitioner, and raises inherent doubts as to the correctness of the decision. Cf. *United States* v. *Lovett*, 328 U.S. 303, 314. It is squarely in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708, in which that Court granted injunctive and declaratory relief to seamen who sought to enjoin the operation of the Port Security regulations adopted under the authority of the Magnuson Act. 64 Stat. 427, 1038, 50 U.S.C., §§ 191, 192, 194. The regulations which the Court there held invalid are substantially similar to the Industrial Security regulations which are challenged in the present case.

The conflict between the decisions is evident. In each case, the relief sought was judicial declaration of the invalidity of an administrative order which, in

practical effect, at least, deprived the complainants of private employment, and an injunction against the enforcement of the challenged order.[15] (Cf., R., p. 8, with 227 F. 2d at p. 710). The right sought to be protected was in each case that of the employee of a private business enterprise to contract with respect to his labor without arbitrary interference by government officials. (Cf., R., p. 3, with 227 F. 2d at p. 714). The grounds upon which the orders were challenged were, in each case, that the regulations were not authorized by statute, (Cf., R., p. 4 with 227 F. 2d at p. 710), and that the regulations, both as promulgated and as administered, have operated to deprive the plaintiffs of their liberty and property without due process of law. (Cf., R., pp. 1-8, ¶¶ 9, 16, with 227 F. 2d at p. 710). In each of the cases, the claimed justification for the orders was the demand of national security considerations.[16] The Court of Appeals for the Ninth Circuit held the controversy to be justiciable and granted the plaintiffs in *Parker* v. *Lester* relief, while the Court below denied petitioner any relief, asserting that there was no justiciable controversy.

This square conflict in the result cannot be resolved on the basis of any supposed difference in the opera-

---

[15] It should be pointed out that the Port Security regulations do, in terms, deny employment in the Merchant Marine if clearance is refused, whereas, the Industrial Regulations on their face do not compel the denial of employment. However, as has been shown (*supra*, pp. 7, 8, 16) the denial of access to classified material bars the person affected, for all practical purposes, from employment in the aircraft industry.

[16] The constitutional power upon which the respondents in the present case must rely is the war power. The Magnuson Act has, perhaps, a broader constitutional base, since it may be argued that it rests upon the war power and upon the commerce power as well.

tion or sweep of the regulations.[17] The constitutional and practical importance of the conflict has been demonstrated. (*supra*, pp. 16 to 18). The position of the Court below, founded upon the assumption that the respondents possess absolute and unreviewable power over the employment of private citizens is erroneous, and the question is one which should, in the interests of a clear delineation of the rights of citizens, be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL W. BERUEFFY
1625 Eye Street, N. W.
Washington, D. C.
Attorney for Petitioner

---

[17] The respondents in their brief in the Court below (p. 33) attempted to distinguish *Parker* v. *Lester* on the ground that the Port Security regulations forbid the disclosure of all information as to the identity of the informants, whereas, respondents assert, the Industrial Security regulations withhold that information only when required by considerations of national security. The fact is, as this record shows, the respondents withhold all information from the affected employee. There is nothing in the record of this case which indicates any valid reason for refusing to reveal the identity of at least some of the informants, or for refusing to permit their cross-examination.

The Court of Appeals tacitly rejected this attempted distinction, since it asserted (*infra*, p. 15a) that the difference is to be found in the fact that the Port Security regulations affect all employees in the Merchant Marine. The theory of the Port Security regulations is that the danger from maritime workers arises from their opportunities to commit sabotage or to act as espionage couriers. Consequently, it is the access to ships which makes all maritime jobs sensitive. *Parker* v. *Lester*, 227 F. 2d 708, 721.